

IN THE SUPREME COURT OF IOWA

No. 222 / 92-1229

Filed June 16, 1993

JAMES A. HUNSAKER III,

Appellant,

vs.

PUBLIC EMPLOYMENT RELATIONS BOARD,

Appellee,

IOWA DEPARTMENT OF PERSONNEL,

Intervenor-Appellee.

242-6511

FILED

JUN 16 1993

CLERK SUPREME COURT

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Appeal from the Iowa District Court for Polk County,  
Glenn E. Pille, Judge.

Hunsaker appeals from a district court order upholding his termination from the Iowa Department of Employment Services. He claims the department wrongfully terminated his employment by disciplining him twice for the same misconduct. AFFIRMED.

David H. Goldman of Black, Goldman & Powell, P.C.,  
Des Moines, for appellant.

Jan V. Berry, Des Moines, for appellee Public  
Employment Relations Board.

CAVEAT : For archival purposes only.  
Not citable due to per curiam/  
unpublished nature. see  
504 N.W.2d 632, 33 (Iowa 1993).

Bonnie J. Campbell, Attorney General, and  
Theresa O'Connell Weeg, Assistant Attorney General, for  
appellee Iowa Department of Personnel.

Considered by McGiverin, C.J., and Carter, Neuman,  
Snell, and Andreasen, JJ.

## PER CURIAM.

This case involves James A. Hunsaker III's claim that his employment was wrongfully terminated by the Iowa Department of Employment Services (DES). Hunsaker appealed the termination to the Public Employment Relations Board (PERB). PERB upheld the termination. On judicial review, the district court upheld the PERB decision. On appeal, Hunsaker claims DES already disciplined him or otherwise acted upon the alleged misconduct. Because of this prior action, he claims the agency was precluded from terminating his employment. We affirm.

The facts are largely undisputed. Hunsaker began his employment with DES in 1972. He subsequently advanced through a number of positions. In 1986, the director of DES, Richard G. Freeman, promoted him to chief of the Field Operations Bureau (FOB). Within the State's merit employment system, the promotion raised him to the level of a Public Service Executive IV.

FOB is a subdivision of DES's Division of Job Service. It is the largest organizational component of DES, employing over 500 individuals. As FOB chief, Hunsaker assumed responsibility over the eleven districts and the sixty-eight job service offices located throughout the state. One of his major responsibilities was to insure that FOB's budget was maintained at authorized levels. These levels were based upon monies available from FOB's funding sources.

FOB's funding came from three major sources: the Federal Employment Services Grant, the Federal Unemployment Insurance Grant, and the state's surtax appropriation. The two federal programs placed several restrictions on the manner in which their money could be used.

Funding from one federal grant could not be used to offset overexpenditures in areas covered by another federal grant. If an overexpenditure occurred, or the money was used for unauthorized purposes, the State was required to repay the money using nonfederal funds. The state surtax appropriation was used by DES to offset funding shortfalls in the federal programs.

During fiscal year 1989, Hunsaker overspent FOB's budget by approximately \$1,000,000. The overspending continued into fiscal year 1990. Other bureau chiefs complained to Freeman because they feared Hunsaker's spending would endanger their budget allocations and the financial position of DES. The overspending ultimately resulted in unfavorable legislative and media attention being focused upon DES.

Freeman subsequently began making changes within DES. He restored the Administrative Service Bureau's control of DES's financial transactions. The bureau chiefs no longer had complete autonomy to determine the extent of their expenditures. He also met with Jacqueline Mallory, a personnel management specialist, to discuss personnel actions. Freeman and Mallory discussed transfers,

promotions and terminations. Freeman ultimately informed Mallory he was removing Hunsaker from the FOB chief position and transferring him to Cedar Rapids as a district supervisor.

The transfer took effect on December 22, 1989. As negotiated by Freeman and Hunsaker, Hunsaker received no pay reduction with his transfer. He retained his classification as Public Service Executive IV. He also received the use of a state car, the moving of his office furniture and personal computer to Cedar Rapids at state expense, additional remodeling expenses, the authorization to receive forty-five days of personal living expenses, letters of commendation and permission to take his deputy with him to his new assignment, if she elected to go.

Also on December 22, the Governor appointed Cynthia Eisenhower to replace Freeman as DES director. The appointment was to become effective on January 8, 1990.

On January 2, 1990, Freeman wrote to Mallory concerning Hunsaker. Freeman told Mallory that he and Hunsaker had agreed that Hunsaker's merit classification would not be changed. Freeman wrote that if Hunsaker's merit classification was to be reduced, his salary should be maintained at the Public Service Executive IV level for as long as possible.

On January 8, 1990, Eisenhower assumed her new position as DES director. She immediately began investigating DES's financial difficulties.

On January 23, 1990, the state auditor released the results of a special DES examination showing that FOB's overexpenditures in fiscal year 1989 exceeded \$1,000,000. Eisenhower met with Hunsaker that day and concluded the session by giving him a written notice of discharge.

Hunsaker unsuccessfully challenged the discharge before the Iowa Department of Personnel (IDOP). Hunsaker then appealed the decision to PERB.

Hunsaker contended his transfer to a position of lesser authority constituted discipline even though it was not accompanied, at the time, by a change in pay grade or classification. He went from supervising 550 people to sixty people.

He further asserted that, even if the transfer was not "discipline," the alleged misconduct had been considered and finally acted upon by his supervisor. He thus maintained that his discharge violated the double jeopardy principles espoused in Hall v. Iowa Merit Employment Commission, 380 N.W.2d 710 (Iowa 1986). He also argued DES did not have "just cause" to terminate his employment.

PERB upheld the discharge and determined that double jeopardy did not apply because the transfer did not constitute "discipline" under IDOP rules and the transfer was not a final agency action. The district court affirmed the PERB decision on judicial review.

On appeal, Hunsaker reasserts the double jeopardy arguments raised before PERB and the district court. Both parties agree that, if DES took any final agency action in regard to Hunsaker's misconduct, it was precluded from disciplining him for the same misconduct. Subsequent discipline for the same misconduct would violate Iowa Code section 19A.9(16) (1989) and 581 Iowa Administrative Code 11.2. Hall, 380 N.W.2d at 715-16. Thus, the issue before this court is whether Hunsaker's transfer amounted to final agency action by DES.

In judicial review proceedings, the district court functions in an appellate capacity to correct errors of law. Marv v. Iowa Dep't of Transp., 382 N.W.2d 128, 131 (Iowa 1986). On appeal, it is our duty to correct errors of law made by the district court. Id. In so doing, we review the agency action as the district court should have pursuant to Iowa Code section 17A.19(8). Id. In a contested case, the agency action must be supported by substantial evidence when the record is viewed as a whole. Iowa Code § 17A.19(8)(f). The agency's findings of fact are binding on this court unless contrary findings are dictated as a matter of law. Norland v. Iowa Dep't of Job Serv., 412 N.W.2d 904, 913 (Iowa 1987).

PERB determined Hunsaker's reassignment was an attempt by Freeman, Hunsaker's supervisor of fourteen years, to take some of the "heat" off of the difficulties surrounding DES's budget problems. According to PERB, if possible,

We believe substantial evidence supports PERB's conclusion that the reassignment was not final agency action. We therefore conclude the double jeopardy principles espoused in Hall do not apply. We affirm the district court judgment and uphold the termination of Hunsaker's employment with DES.

AFFIRMED